88-379

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Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICHARD R. PHILLIPS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT, DENVER, COLORADO

RICHARD R. PHILLIPS
Petitioner, Pro Per
P.O. Box 4071
Grand Junction, Colo 81502

QUESTION PRESENTED

1. Whether the lower Court erred by prosecuting and convicting petitioner for willful failure to file returns while returns were timely filed?

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PETITION FOR WRIT OF CERTIORARI
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APPLICATION FOR CERTIORARI

COMES NOW the petitioner, Richard R. Phillips, and respectfully applies for Certiorari to this Honorable Supreme Court of the United States of America from the Order and Decision entered by

the United States District Court and affirmed on Appeal by the Tenth Circuit Court of Appeals.

IN SUPPORT THEREOF, the following is shown unto the Court.

JURISDICTIONAL STATEMENT

This Court has original jurisdiction pursuant to the Constitution of the United States of America, Article III.

There has been a final judgment by the Tenth Circuit Court of Appeals pursuant to 28 USC §1292.

ISSUES INTENDED FOR PRESENTATION

1. Whether the lower Court erred by prosecuting and convicting appellant for willful failure to file returns while returns were timely filed.

[redacted]

The petitioner, Richard R. Phillips, was charged by information with three counts of willfully failing to make income tax returns under 26 U.S.C. §7203, Internal Revenue Code of 1954.

On May 1, 1986, a jury returned a verdict of guilty under all counts. Under the judgment and commitment order of the United States District Court, Judge Zita L. Weinshienk, dated May 27, 1986, the appellant was ordered imprisoned for a term of one year with respect to count I. It was further ordered that the imposition of sentence as to counts II and III be suspended and the petitioner placed on probation for five (5) years as to Count II and to five (5) years to count III. Probation periods to run concurrently and commencing uypon release from confinment.

The petitioner voluntarily turned himself in to the prison authorities and timely filed his notice of appeal to the Tenth Circuit Court of Appeals.

Thereafter, the Tenth Circuit affirmed the conviction as aforestated. The petitioner was given until February 20, 1988 to file request for rehearing en banc, however, petitioner did not receive said order until February 24, 1988. The petitioner served his prison term and is presently on probation.

The district Court erred when it prosecuted, convicted, and sentenced the petitioner to jail for willful failure to file returns while returns were timely filed regarding the petitioner.

Petitioner submits the attention of this Supreme Court of the United States need be directed to the issues of this case because of the grave Constitutional consequences and public importance.

ARGUMENT

The government charged the petitioner with willful failure to file returns for three years. The government introduced at trial W-2 information returns regarding the petitioner which were timely filed during each year in question. The secretary utilized said W-2 returns of information.

The question presented herein is whether the petitioner may be lawfully prosecuted and convicted for willful failure to file tax returns under authority of §7203, I.R.C. when returns of information were timely submitted and certified?

This question thus hinges on the determination whether W-2 forms are returns and whether said W-2 returns may be filed in lieu of 1040 forms.

Petitioner presented this defect

to the Tenth Circuit Court of Appeals. The Court made no mention of said defect in the opinion rendered.

The Internal Revenue Code of 1954, §7203, Title 26 U.S.C. reads in part as follows:

"Any person required under this title...to make a return,..., who willfully fails to make such return,..., shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000.00 (...) or imprisoned not more than 1 year, or both..."

One example of how a citizen would not be subject to the above section 7203 is if one was not required to make a return. Another example would be if a citizen already has on file returns with the Secretary of Treasury with information provided to compute a tax liability, if any.

As stated previously, the government introduced W-2 tax returns for calendar

years ended 1979, 1980, and 1981. These returns were sent to the Secretary of Treasury and were timely filed. (See Government Exhibits 3,8,12,16,20,24, Trial Transcript, Vol 5, page 477,478).

26 Code of Federal Regulations, 601.17(a) (1949) set forth the description of the forms to be used "in connection with the Taxes imposed under chapters 1 and 2 of the Code," including (but not limited to) income taxes. Among those forms, the following were described:

"Forms W-2. Withholding statement. This is a statement of wages paid during the calendar year and the amount of income tax withheld on such wages, if any. The original and duplicate are furnished by the employer to the employee at the close of the calendar year or upon termination of his status as an employee. The original is used as an optional income tax return by the employee in lieu of Form 1040. (emphasis added)

Form 1040. Individual income tax return for net incomes from salaries, wages, dividends, interest, annuities, and incomes from other sources regardless of amounts, for calendar or fiscal year.

A return may be made on this form, unless Form W-2 is filed,..."

Note under these statutory regulations, a W-2 form is in fact a federal tax return and is to be used as an optional income tax return in lieu of form 1040.

With the original W-2 returns timely filed with the Secretary of Treasury, the petitioner was not required to make further returns. As such, the petitioner could not have been in violation of §7203, I.R.C.

Pursuant to Title 44 U.S.C.S. §1507, "The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number." (Oct. 22, 1968, P.L. 90-620, §1, 82 Stat. 1276).

Contained in the Federal Register, Wednesday, September 11, 1946, #177A-41,

BEST AVAILABLE COPY

The following is found with respect to form 1040: "A return must be made on this form, unless Form W-2 if filed,...,". (emphasis added). At §177A-39, the following is found with respect to form W-2: "The original is used as an optional income tax return by the employee in lieu of Form 1040." (emphasis added).

Furthermore, the Internal Revenue Service informs its' special agents that the W-2 is a tax return. In the HANDBOOK FOR SPECIAL AGENTS, Criminal Investigation Division, Section 348.2 (1-18-80) provides as follows:

Definitions

(1) A "return" is any tax return or information return, schedules, and attachments thereto, including any amendment or supplement, which is required or permitted to be filed and is in fact filed by a taxpayer with the Secretary of the Treasury.

Examples include:

(a) Forms 1040, Schedules A,B,C and Forms W-2.

(b) A taxpayer has filed an income tax return and subsequently submits a

letter to IRS explaining an item on the original return. The letter is within the definition of return.

The foregoing clearly explains that Government Exhibits (W-2 returns) are federal tax returns and are to "be used" as alternatives to filing 1040 forms.

In United States v. Birkenstock, #86-2623, Seventh Circuit, June 22, 1987, the panel gave a very weak opinion that Birkenstock's reliance upon an old statute is misplaced because nothing in the new statute permits the filing of a W-2 information return as a substitute to a 1040 information return. The Court claims the old statute was repealed, however fails to state where the old law was repealed and where there is a manifest and total repugnancy in the new provisions to lead to the conclusion that the later laws abrogated, and were designed to abrogate, the former. To

this egregious opinion the petitioner will show:

The introduction to the CODE OF FEDERAL REGULATIONS, TITLE 26 - INTERNAL REVENUE, 1954, Part 221 to End, Revised, 1955, reads as follows: The enactment of the Internal Revenue Code of 1954, August 16, 1954, gave rise to a unique problem in the codification of the rules and regulations of the Internal Revenue Service. To accommodate rules and regulations implementing the new Internal Revenue Code, a new title was established in the Code of Federal Regulations entitled "Title 26 - Internal Revenue, 1954," designed to replace "Title 26 - Internal Revenue" contained in the 1949 Edition. However, since many of the regulations implementing the Internal Revenue Code of 1954 had not been issued by the end of 1954, it was decided to publish both titles as of January 1, 1955, and for

the same reason, it was necessary to continue publication of both titles as of January 1, 1956. (emphasis added).

Here we see the assertion that the 1954 version of Title 26 of the CFR was "designed to replace 'Title 26 Internal Revenue' contained in the 1949 Edition." However, according to this verbiage, both titles were considered in force as of January 1, 1956. It should be noted that the word "replace" does not mean "repeal". "Replace" in this context, cannot mean "restore to a former position." Blacks, 5th Ed. Because of the duality of existence of both Codes, "replace" could only mean "substitute for." In other words, they could both be used.

In Subchapter H, entitled "INTERNAL REVENUE PRACTICE, Part 601 - Statement of Procedural Rules, Subpart A - General Procedural Rules," SUBPART A - GENERAL PROCEDURAL RULES reads, in pertinent

part, as follows:

SOURCE: Section 601.01 to 601.109 appear at 20 F.R. 4621, June 30, 1955, except as otherwise noted.

Section 601.101 Introduction (a) General. The Internal Revenue Service is a branch of the Treasury Department under the immediate direction of the Commission of Internal Revenue. The Commissioner has general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue .... The Internal Revenue Service is the agency by which these functions are performed. Generally, the procedural rules of the Service are based on the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954, and the procedural rules in this part apply to the taxes imposed by both Codes except to the extent specifically stated or where the procedure under one Code is incompatible with the procedure under the other Code. References to sections of the Code are references to the Internal Revenue Code of 1954, unless otherwise expressly indicated. (emphasis added).

Notice that procedural rules are, at that point, "based on the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954, and the procedural rules in this part apply to the taxes imposed by both Codes." The argument

that the 1954 Internal Revenue Code automatically repealed the 1939 Internal Revenue Code is, thus, not valid, at least insofar as there was no incompatiblity. The W-2 returns are hardly incompatible; they existed in both Codes and served the same functions. Additionally, the reference in Section 601.101(a) is to "procedural rules", not to the regulations.

Section 601.101, ibid, continues, stating:

> (b) Scope. This part sets forth the procedural rules of the Internal Revenue Service respecting all taxes administered by the Service, and supersedes the previously published statement (26 CFR (1939) Parts 600 and 601) with respect to such procedural rules.

Again, according to Black's, supra, "supersedes" can mean "obliterate, set aside, annul, replace, make void, inefficacious or useles, repeal." Here

The word "supersedes" cannot mean obliterate, set aside, annul, make void, inefficacious or useless, or repeal, since according to the introduction to 26 CFR of 1955 cited above, 26 CFR of 1939 was still in effect at the time of the publication of the above cited Part. Therefore, 26 CFR (1954), Parts 600 and 601, also did not repeal, but, at most, replaced, or substitued, the previous Parts 600 and 601, which were still valid. As further evidence of the continuing effective status of the 1939 Internal Revenue Code, 26 CFR Section 601.102, entitled "Classification of taxes collected by the Internal Revenue Service - (a) Principal divisions defined "Taxes collected principally by assessment ... into ... two main classes" of which one was "Taxes within the jurisdiction of the Tax Court of the United States," which included "Income and profits taxes

imposed by chapters 1 and 2 of the 1939 Code and taxes imposed by subtitle A of the 1954 Code, relating to income taxes." Again, the 1939 Code was still enforceable. The 1939 Code could not still be in force if the 1954 Code had "repealed" the 1939 Code.

The "CUMULATIVE POCKET SUPPLEMENT TO THE CODE OF FEDERAL REGULATIONS, As of January 1, 1957" explains:

> This pocket Supplement contains in full text the changes and additions to Part 300 to End of Chapter I of Title 26, and Title 27 of the Code of Federal Regulations issued pursuant to the Internal Revenue Code of 1939 which were fully promulgated during 1949-1956, and which were in force and effect on December 31, 1956. All of the regulations issued by the Internal Revenue Service pursuant to the Internal Revenue Code of 1954, fully promulgated during 1954-1956, and the complete text of the regulations of the Tax Court of the United States Comprising Chapter II of Title 26 (Part 700 to End), as of January 1, 1957, are contained in separate volumes entitled "Title 26 - Internal Revenue, 1954." (emphasis added).

The regulations contained in Title 26 of the CFR of 1949 "issued prusuant

to the Internal Revenue Code of 1939 which were fully promulgated during 1949-1956 ..., were in force and effect on December 31, 1956." The reason why Title 26 of the CFR of 1949 had to remain in force and effect was given in Section 10, explaining the Internal Revenue Title, which states:

> The Internal Revenue Title, heretobefore referred to, and hereby and herein enacted into law, is as follows: (53 Stat. 1a)

HISTORY OF INTERNAL REVENUE CODE

The Internal Revenue Code, approved February 10, 1939, consists of the preliminary sections relating to enactment, set out above, and the Internal Revenue Title, containing all United States statutes of a general and permanent nature relating exclusively to internal revenue, in force on January 2, 1939.

This code is not an innovation in Federal legislation, for the Criminal Code and the Judicial Code are two modern statutes enacted by Congress for the purpose of codifying the laws elating to their respective topics. However, it is the first federal act of its kind relating exclusively to internal revenue since the publication of the Revised Statutes of the United States, approved June 22, 1874.

The Internal Revenue Code traces its ultimate origin to 164 separate enactments of Congress. The earliest of these was approved July 1, 1862, and the latest on June 26, 1938.

These statutes were codified without substantive change and with only such change of form as was required by arrangement and consolidation. The only provision not derived from a law approved prior to January 1939, was that relating to the effective date.

In June 1926 Congress passed the "Code of the Laws of the United States" which was the first general codification of Federal statutes since the Revised Statutes. It was revised in 1934 and again in 1940. The compilers of the United States Code acting under the supervision of the Revision of Laws Committee of the House of Representatives, incorporated all internal revenue laws of a general and permanent nature in Title 26, Internal Revenue.

Title 26 of the United States Code was derived from the same general souces used in preparing the Internal Revenue Code. Many sections in this title were taken from the Revised Statutes and others were based upon provisions of enactments passed subsequent to the Revised Statutes and in force on December 7, 1925. The title was supplemented annually by the compilers as Congress enacted new internal revenue acts. It was prima facie evidence of the internal revenue laws of a general and permanent nature from 1926 until the statutes upon which it was based were repealed in 1939 by the Internal Revenue Code.

* * *

> By section 4 of the codifying act of Feb. 10, 1939, 53 Stat. 1, all laws and parts of laws embodied in the code to the extent they related exclusively to Internal Revenue were repealed. (emphasis added).

In other words, the 1939 Internal Revenue Code was actually legislated as a group of statutes which expressly repealed the previous Internal Revenue Code; the 1939 Code was not just a codification of the law, as is the 1954 Code, even until today. The 1939 Code was, and is, what is referred to as positive law whereas the 1954 code is only prima facie evidence of the actual underlying statutory provisions which include the 1939 Code, the Statutes at Large published since 1939 and the supporting Code of Federal Regulations and pertinent parts of the Federal Register.

In the Preface of the 1949 Edition

of the United States Code, there is stated what the U.S. Code means relative to positive law:

> Inasmuch as many of the general and permanent laws which are required to be incorporated in this Code are inconsistent, redundant, archaic, and obsolete, there has been inaugurated a comprehensive project of revisintg and enacting the Code, consisting of 50 titles, into positive laws, title by title.
>
> When this work is completed all titles of the code will be legal evidence of the general and permanent law ... (emphasis added)

In other words, only when a particular title is enacted into law may it be said that it is "positive law," that is, it is not "inconsistent, redundant, archaic, and obsolete." By 1982, the task started in 1946 was not complete, and the Preface to the United States Code Annotated, 1982 ed., set forth the status at that point:

> Because many of the general and

permanent laws that are required to be incorporated in the Code are inconsistent, redundant, and obsolete, the Office of the Law Revision Counsel of the House of Representatives has been engaged in a continuing, comprehensive project authorized by law to revise and codify, for enactment into positive law, each title of the Code. When this project is completed, all the titles of the Code will be legal evidence of the general and permanent laws and recourse to the numerous volumes of the United States Statutes at Large for this prupose will no longer be necessary. Titles 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 32, 32, 35, 37, 38, 39, 44, and 49 have been revised, codified, and enacted into positive law and the test thereof is legal evidence of the laws therein contained. The matter contained in the other titles of the Code is prima facie evidence of the laws.

A memorandum entitled "Why Title 26 of the United States Code has not been Enacted as Positive Law," issued May 7, 1981, by the American Law Division of the Congressional Research Service of the Library of Congress states that:

According to the Office of Law Revision Counsel (of the House of Representatives) the Internal Revenue Code of 1954 as amended, does not meet

the criteria for enactment into positive law ...

In addition, according to the Office of the Law Revision Counsel the Internal Revenue Code in its present form does not meet the standards of consistency and conformity.

In other words, Title 26, or the Internal Revenue Code as it exists today, is, under the admissions made in 1946, and later in 1981, still "inconsistent, redundant, archaic, and obsolete." Obviously, if the great legal minds of Congress consider Title 26 to be in such bad straits, then we "men of common intelligence must necessarily guess at its meaning." Connally v. General Construction Co., 269 US 385, 391 (1926).

However, we do not need to guess at its status. The 1954 Code is only prima facie evidence of the statutes undergirding that Code. The 1939 Code, on the other hand, is statutory and has been neither expressly, nor impliedly,

repealed. In that event, the Code of Federal Regulations relating to the 1939 Code also cannot have been repealed.

Furthermore, the sections of the 1954 version of 26 CFR which are related to the W-2 sections of the 1949 version of 26 CFR are completely compatible. The pertinent 26 CFR Section 601.104 of 1954, relating to collection functions, reads as follows:

(a) Collection methods - (1) Returns. Generally, an internal revenue tax assessment is based upon a return required by law or regulations to be filed by the taxpayer upon which he himself computes the tax in the manner indicated by the return. If a taxpayer fails to make a return it may be made for him by a district director, revenue agent, or other duly authorized office thereunder. Returns must be made on the forms prescribed by the Internal Revenue Service. Forms are obtainable at the principal and branch offices of district directors of internal revenue. District directors commonly mail forms to persons who they have reason to believe may be requried to file returns, but failure to receive a form does not excuse failure to comply with the law or regulations requiring a return. Returns, supplementary returns, statements or schedules and the time

for filing them may sometimes by prescribed by regulations issued under authority of law by the Commissioner with the approval of the Secretary of the Treasury. In the case of certain individual income taxpayers having gross income not exceeding an amount prescribed by law and consisting of income from specified sources, a special form (Form 1040A) is prescribed upon which the taxpayer may set forth the information necessary to a determination of his tax liability, and the district director will compute the tax due and mail to the taxpayer a notice and demand for payment. A husband and wife may make a single income tax return jointly.

There is nothing contained in the above section which is incompatible with the W-2 substitution premitted in the 1949 CFR. Thus, Parts 600 and 601 of the 1954 26 CFR could not really "supersede" the 1939 26 CFR and even if they could, only "superseded" the 1939 26 CFR to the extent set forth, which was as follows, 26 CFR 601.101 (1954), supra:

CODIFICATION: Section 601.101 (b) was amended as follows, 20 F.R. 7731, Oct. 14, 1955:

1. The first two sentences were

deleted and the first sentence set forth above was substituted therefor.

2. The sentence beginning with the words "The procedural rules" was inserted immediately following the sentence ending with the words "contained in Subpart F" and preceding the sentence beginning with the words "Subpart G relates".

Furthermore, the following quote from the 1954 Federal Register clearly shows the 1939 Code was not repealed by the 1954 Code.

FEDERAL REGISTER Tues. Oct. 19, 1954
Volume 19, Number 203, Page 6687

"....The new title does not supersede the present "Title 26--Internal Revenue" as to those facts or circumstances to which the provisions of the Internal Revenue of 1939 are applicable."

In the case United States v. Barnes, 222 U.S. 513 (1911), this Court determined "The more natural, if not the necessary, inference in all such cases is, that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law,..." "There certainly,

under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate, the former." 222 US at 520.

"It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." (emphasis added) Saxonville Mills v. Russel, 116 US 13,21; cited by Barnes supra, at 222 US 520, 521.

Furthermore, the Birkenstock panel, supra, claimed, even if the outdated regulation were still in force, it would not help the defendant's position because he did not send the original W-2 information return to the Secretary. The panel then erroneously assumes the defendant's employer sent the employer's

copy to the Secretary. The older regulation allowed the employee to send the original W-2 to the Secretary as a substitute to the 1040. Under the new regulation however, the employee no longer receives the original (Copy A) because the employer sends the original to the Secretary as it is stated on the W-2 itself. Nothing has changed from the new provisions with respect to the old provisions except the employer sends the original information return to the Secretary and sends a copy to the employee. That original still constitutes a substitute because nothing in Part 601 displays a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate the former. Barnes, surpa.

Furthermore, in Scar v. C.I.R., 814 F.2d 1363 (9th Cir. 1987), in a dissenting

opinion by Circuit Judge, Cynthia Holcomb Hall, she states at foot note 4: "With well over 100 million income tax returns plus an even larger number of information returns, such as Forms W-2 and 1099's, being filed annunally, it is no wonder the Commissioner has turned to the computer." (emphasis added).

In Scar, supra, a Circuit Judge recognizes a W-2 is in fact an information return. It provides information returned to the Secretary so he may assess a tax as it is his duty under I.R.C. §§6201, 6202, and 6303.

Furthermore, IRS Regulation (1983) §1.6052-1 confirms the Secretary considers W-2 forms to be returns. (See petitioner appendix, page 10,11) Because returns were timely filed with respect to the petitioner; returns which the Secretary could have assessed a tax upon, (as he utilizes said returns to determine

deficiencies under §6213, I.R.C.), the petitioner could not be guilty of willful failure to file returns.

In case of doubt, all doubt must be resolved in favor of the petitioner. Gould v. Gould, 245 US 150 (1971).

C O N C L U S I O N

WHEREFORE, the petitoner prays this Court grant this Application; reverse and remand this case to the district court with order to dismiss the information with prejudice; and what other and further relief this Court deems just and fair.

Respectfully Submitted this 20 of May, 1988.

Richard R. Phillips
Petitioner, pro per
P.O. Box 4071
Grand Junction, Colo 81502

CERTIFICATE OF SERVICE

I hereby certify that I mailed tw
correct copies of the foregoing to the
Solicitor General, Department of Justice,
Washington, D.C. 20530, this 20 day
of May, 1988, in a plain
wrapper, postage prepaid.

Richard A. Phillips

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.) No.86-1847

RICHARD R. PHILLIPS,)

Defendant-Appellant.)

ORDER AND JUDGMENT

Before LOGAN, SEYMOUR, and ANDERSON

After examining the briefs and the appellate record, this three-judge panel has determined unanumously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.B(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

The defendant, acting pro se, brings this direct criminal appeal from his conviction at a jury trial of three counts of willfully and knowingly failing to file income tax returns as proscribed by 26 U.S.C. §7203. The defendant was shown to have earned approximately $22,200, $30,300, and $24,500 for the years 1979, 1980, and 1981, respectfully, and that he knowingly failed to file income tax returns for those years.

Three assignments of district court error are advanced by the defendant. The first of these is stated as "whether the trial court erred and denied due process and violated First Amendment constitutional right of peaceful redress, when it refused to exercise its de novo jurisdiction of review over a challenged agency action prior to a criminal prosecution." By this the defendant appears to argue that he should have

been accorded some sort of evidentiary hearing by the district court prior to his criminal prosecution. This contention is meritless.

The defendant cites 5 U.S.C. §706(2) as support for his claim that a "de novo review" of his case should have been carried out prior to his prosecution. Section 706(2), which is part of the Administrative Procedure Act, concerns only review of the actions of administrative agencies. This provision has nothing to do with separate criminal prosecutions that are based on the recommendation of an administrative agency. The decision on whether to prosecute is left to the discretion of the United States Attorney. See 28 U.S.C. §547 and United States v. Kysar, 459 F.2d 422,424 (10th Cir. 1972). Therefore, this criminal case in no way involves the review of agency action pursuant to §706(2).

The defendant's second ground for reversal is stated as "whether the trial court erred and denied due process where the defendant challenged the subject matter jurisdiction of the court and the court did not require the plaintiff, or allow the defendant to make an offer of proof." Under this heading, the defendant seems to argue that the court lacked subject matter jurisdiction over the criminal proceeding and personal jurisdiction over him. Again, the defendant is mistaken.

The district court certainly had subject matter jurisdiction over the matter before it. See United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986). The defendant's argument concerning personal jurisdiction is that he was not a taxpayer within the scope of the revenue laws. This contention is facially without merit. It was proven at trial

that the defendant had earned enough in wages to be required to file tax returns.

Lastly, the defendant claims the district court judge erred in declining to recuse herself pursuant to 28 U.S.C. §144. No rational reason has ever been advanced in support of the recusal motion. We conclude that the district court acted well within its discretion in denying the motion.

AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURIAM

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
United States CourtHouse
Denver, Colorado 80294

February 10, 1988

Mr. Robert N. Miller
U.S. Attorney
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Drawer 3615
Denver, CO 80294

Mr. Richard R. Phillips
P.O. Box 4071
Grand Junction, CO 81502

Re: 86-1847, USA v. Phillips
(Lower docket: 84-CR-68)

Dear Mr. Phillips and Counsel:

Enclosed is a copy of an order entered today in the captioned case.

Please call this office if you have any quesitons.

Sincerely yours,

ROBERT L. HOECKER
Clerk

By: (Signed)
Chief Deputy Clerk

RLH:kmh
Enclosure

[redacted]

Before Honorable James K. Logan, Honorable Stephanie K. Seymour and Honorable Stephen H. Anderson, Circuit Judges.

UNITED STATE OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	#86-1847
	)	
RICHARD R. PHILLIPS,	)	
	)	
Defendant-Appellant.	)	

Appellant's motion for extension of time to file his petition for rehearing is granted through February 20, 1988.

ROBERT L. HOECKER, Clerk

By Signed
PATRICK FISHER
Chief Deputy Clerk

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

TO ALL TO WHOM THESE PRESENTS SHALL COME. Greetings:

By virture of the authority vested in me by the Archives of the United States, I certify on his behalf, that the seal of the National Archives and Records Administration, that the attached reproduction(s) is a true and correct copy of documents in his custody.

Signed_____
JOHN R. BYRNE
4/22/87
Director of the
Federal Register

NA FORM 130400 (11-86)

Form W-2. Withholding Statement. This is a statement of wages paid during the calendar year and the amount of income tax withheld on such wages, if any. The original and duplicate are furnished by the employer to the employee at the close of the calendar year or upon termination of his status as an employee. The original is used as an optional income tax return by the employee in lieu of Form 1040.

Form 1040, [redacted] tax return for net income from salaries, wages, dividends, interest, annuities, and incomes from other sources regardless of amounts, for calendar or fiscal year. A return must be made on this form, unless Form W-2 is filed, by every citizen of the United States whether residing at home or abroad and every person residing in the United States though not a citizen thereof, having for the calendar or fiscal year a gross income equal to or in excess of the personal exemption prescribed in the revenue act applicable to the year involved.

[redacted]
1.6052-1.

INFORMATION RETURNS REGARDING PAYMENT OF WAGES IN THE FORM OF GROUP-TERM LIFE INSURANCE.

(a) Requirement of reporting-(1) In general. Every employer, who during any calendar year provides any one of his employees remuneration for services in the form of group-term life insurance on the life of such employee any part of the cost of which is to be included in such employee's gross income as provided in section 79(a), shall make a separate return on Form W-2 with respect to each such employee for such year which includes the following information:

(i) Name, address, and identifying number of the employer;

(ii) Name, address and social security number of the employee; and

(iii) Total amount includivble

in the employee's gross income by reason of the provisions of section 79(a), computed as if such employee reported his income on the basis of a calendar year (determined as if the employer making such return is the only employer paying the employee remuneration in the form of group-term life insurance on his life, which is includible in his gross income under section 79(a)).

Returns on Form W-2 required to be filed pursuant to the provisions of this section shall be transmitted by Form W-3. In a case where, with respect to the same employee, and employer must make a return on Form W-2 under this section and also under §31.6011(a)-4 or §31.6011(a)-5 shall also be used as the transmittal form for a return on Form W-2 made pursuant to the provisions of this section.

1 Control number	33333	
☐ Kind of Tax Statements Transmitted ▷	2 941/941E ☐ Military ☐ 943 ☐ CT-1 ☐ 942 ☐ Section 218	3 W-2 ☐ ☐ W-2P	4 Original ☐ Corrected	5 With TNT ☐ Without TNT
6 State EIN number 69-	7 Advance EIC payments	8 Number of statements attached
9 Federal income tax	10 Wages, tips, and other compensation	11 FICA tax withheld
12 Employer's State number	13 FICA wages	14 FICA tips
15 Employer's identification number —		16 Establishment number
17 Employer's name		18 Gross annuity, pension, retired pay, or IRA payments
		20 Type of Organization
19 Employer's address and ZIP code (If available, place label over boxes 15, 17, and 19.)		

Under penalties of perjury, I declare that I have examined this return, including accompanying statements, and to the best of my knowledge and belief, they are true, correct, and complete. In the case of documents without employer identification numbers, I have requested them in accordance with instructions issued by the Internal Revenue Service, but did not receive them.

Signature ▶ Title ▶ Date ▶

Form W-3 Transmittal of Income and Tax Statements 1981 ▼ Department of the Treasury

BEST AVAIL

1 Control number	22222	For Official Use Only	
2 Employer's name, address, and ZIP code		3 Employer's identification number	4 Employer's State number
		5 Stat. emp. Deceased Pension plan Legal rep. 942 emp. Subtotal Void	6
		7 Advance EIC payment	
8 Employee's social security number	9 Federal income tax withheld	10 Wages, tips, other compensation	11 FICA tax withheld
12 Employee's name (first, middle, last)		13 FICA wages	14 FICA tips
		15 Employer's use	
16 Employee's address and ZIP code		17 State income tax	18 State wages, tips, etc. 19 Name of State
		20 Local income tax	21 Local wages, tips, etc. 22 Name of locality

Form **W-2 Wage and Tax Statement 1981** • Copy A For Social Security Administration • See Instructions for Forms W-2 and W-3P — Department of the Treasury Internal Revenue Service

Do NOT Cut or Separate Forms on This Page

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